

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MACKIE STURGILL,

Defendant-Appellant.

UNPUBLISHED

July 2, 1999

No. 202299

Ingham Circuit Court

LC No. 96-070790 FC

Before: Griffin, P.J., and McDonald and White, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of three counts of first-degree criminal sexual conduct, MCLA 750.520b(1)(a); MSA 28.788(2)(1)(a), for which he was sentenced to concurrent terms of thirty to sixty years for each count. We affirm.

This case stems from defendant's contact with his wife's eight-year-old niece in April of 1996. The complainant testified that after spending the night with defendant and his family, she left for school and was told by defendant to return after school for a "surprise." When she arrived, and while defendant's children and brother were otherwise occupied, defendant forced her to perform numerous sexual acts. The jury ultimately found that defendant had engaged in sexual penetration with his niece three times.

I

Defendant's first claim of error is that the trial court violated his due process rights by admitting evidence of other sexual acts he had allegedly committed against the complainant. We disagree. Evidence of other sexual acts between the victim and defendant were appropriately presented to the jury pursuant to *People v DerMartzex*, 390 Mich 410; 213 NW2d 97 (1973). A reasonable trier of fact might have found it highly implausible that defendant would suddenly demand that his eight-year-old niece perform numerous sexual acts unless he had some reason to believe that she would not disclose the incident. Further, the evidence met the requirements of MRE 403; that is, the evidence's probative value was not substantially outweighed by the risk of unfair prejudice. *DerMartzex*, *supra* at 415. The

evidence was probative of the complainant's credibility and the other acts presented to the jury were no worse than those for which defendant was charged.

II

Defendant's second claim of error is that he was denied effective assistance of counsel when his trial counsel failed to object to the prosecutor's child sexual abuse expert testifying that the complainant was believable. We reject this argument for two reasons. First, in light of counsel's performance as a whole, the failure to object to this testimony was likely a matter of trial strategy. As our Supreme Court has observed, "there are times when it is better not to object and draw attention to an improper comment." *People v Bahoda*, 448 Mich 261, 287; 531 NW2d 659 (1995). This Court will not substitute its judgment for the judgment of trial counsel in matters of trial strategy. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). Regardless of whether defense counsel's actions were a matter of trial strategy, defendant has not shown that the "representation so prejudiced [him] as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Defendant was required to show that there was a reasonable probability that, but for his counsel's error, he would have been acquitted, and that the trial was fundamentally unfair or unreliable. *People v Stanaway* 446 Mich 643, 687-688; 521 NW2d 557 (1994). He has not met this burden.

III

Defendant's final claim of error is that he was denied effective assistance when trial counsel failed to impeach the complainant's adoptive mother's testimony. At a *Ginther*¹ hearing, defendant's wife submitted an affidavit to the court stating that the complainant's mother had been urging her to leave defendant for some time, allegedly so they could take defendant's property and all move in together (the complainant, her adoptive mother, and defendant's wife and children). The lower court denied defendant's request for a new trial.

As an initial matter, we note that the issue in this case is whether defendant was denied the effective assistance of counsel when counsel failed to *present* impeachment testimony, not whether the trial court erred in refusing to allow impeachment testimony. If defense counsel was aware of the witness' alleged motives, then neglecting to use that information to impeach her may have fallen below an objective standard of reasonableness, *Pickens*, *supra* at 302-303. However, there was sufficient information on the record to support the court's finding that defense counsel was unaware of the complainant's mother's alleged motives, and to suggest that defendant's wife's testimony was unreliable, as found by the trial court. *People v Snell*, 118 Mich App 750, 756; 325 NW2d 563 (1982); *People v Tennon*, 70 Mich App 447, 448; 245 NW2d 756 (1976). Counsel could not have been expected to make effective use of information of which he was not aware. *People v Tommdino*, 187 Mich App 14, 17-18; 446 NW2d 315 (1991).

Finally, defendant has failed to show that he was deprived of a substantial defense as a result of counsel's failure to present this evidence. *Pickens*, *supra*; *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), modified 453 Mich 902 (1996). At best, impeaching the complainant's mother's testimony *may* have suggested that the complainant fabricated her claim,

allowing defendant to attack her credibility. In this case, however, counsel attacked the complainant's credibility throughout the trial and brought out many inconsistencies in her testimony. Therefore, defendant's final claim must fail.

Affirmed.

/s/ Richard A. Griffin
/s/ Gary R. McDonald
/s/ Helene N. White

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).